UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. FREEMAN, II **Plaintiff,** **v.** **BILL LANN LEE, *et al.*,** **Defendants.**	**Civil Action 97-2279(HHK)**

MEMORANDUM AND ORDER

This matter is before the Court on the federal defendants' motion to reconsider the Court's order permitting the plaintiff, John A. Freeman, II, a prisoner proceeding *pro se,* to proceed *in forma pauperis*. The defendants contend that the Prison Litigation Reform Act, Pub.L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), prohibits the plaintiff from proceeding *in forma pauperis* because previously he has filed four cases that have been dismissed for being frivolous, or malicious or for failing to state a claim. Because the defendants are plainly wrong, their motion must be denied.

I

The PLRA at U.S.C. § 1915(g) bars a prisoner from proceeding *in forma pauperis* in a civil action or on appeal of a judgment in a civil action if the prisoner

> has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Contending that on four prior occasions the plaintiff, while incarcerated, has suffered a dismissal as described in 28 U.S.C. § 1915(g) ("§ 1915(g) dismissal" or "strike"), the defendants assert that the plaintiff should be precluded from proceeding *in forma pauperis* in this action. The federal defendants maintain that a § 1915(g) dismissal was entered against Mr. Freeman in Freeman v. Skunda, No. 760CL97C00282-00 (Cir. Ct. City of Richmond, April 7, 1997) and Freeman v. Henceroth, Civ. Action No. 96-00606 (E.D. Va. Sept. 24, 1996) and that two such dismissals were entered in Freeman v. Rogers, Civ. Action No. 95-00929 (E.D. Va. Jan. 29, 1997), aff'd 120 F.3d 261 (4th Cir. 1997) (table), 1997 WL 414296 (text). The Court disagrees..

The premise of the defendants' contention that the dismissal of Mr. Freeman's civil action in the Circuit Court of the City of Richmond action qualifies as a § 1915(g) dismissal is that a dismissal may qualify as a strike as long as it is entered in any court that is located within the United States. Consequently, the defendants maintain, the dismissal of Mr. Freeman's civil action in the Circuit Court of the City of Richmond action qualifies as a strike because it was entered "**in** a court of the United States." (Defts' Mot. To Reconsider)(emphasis supplied). The federal defendants' *ipse dixit* statement is frivolous and results from a clearly erroneous reading of § 1915(g).

Insofar as is relevant to the present discussion, the meaningful operative words in § 1915(g) are "court **of** the United States." [1] In 28 U.S.C. § 451, "court of the United States" is defined as " the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title . . . and any court created by Act of Congress. . . ." State and local courts do not fall within this definition. Consequently, the dismissal of Mr. Freeman's action in the Circuit Court of the City of Richmond, a state court, does not qualify as a strike.

There is another reason why the dismissal of Mr. Freeman's action in the Circuit Court of the City of Richmond does not count. The only dismissals that are encompassed by § 1915(g) are those that are based on a court's determination that the underlying action or appeal is "frivolous, malicious, or fails to state a claim upon which relief may be granted." In its order dismissing Mr. Freeman's action, the Circuit Court of the City of Richmond simply states that it does so "for the reasons stated in [the] Demurrer and Motion to Dismiss." It does not recite the ground upon which it is based. Therefore, the court does not know the basis of the dismissal and is unaware of any principle that would permit the court to presume that the dismissal was on one of the grounds referenced in § 1915(g).

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[1] The court observes that in the defendants' reply to the plaintiff's opposition to their motion, the defendants have not persisted in arguing that the dismissal in the Circuit Court of the City of Richmond counts as a strike. They do no explicitly concede the point, however.

II

The federal defendants also contend that a dismissal of Mr. Freeman's action by the United States District Court for the Eastern District of Virginia for failure to state a claim and the Fourth Circuit's affirmance of that dismissal constitute two strikes.[2] Citing Hains v. Washington, 131 F.3d 1248, 1250 (7th Cir. 1997) and Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996), the federal defendants proclaim, "[c]ourts have held that an affirmance on appeal of a dismissal or a dismissal on appeal counts as a separate strike for purposes of the three strikes provision." Reply to Pl.'s Opp. to Fed. Defts. Mot. to Reconsider at 2. Neither of the two cases cited by the federal defendants support their position.

In Hains the Seventh Circuit stated "[a] frivolous complaint (or as in this case a complaint that is dismissed under § 1915A for failure to state a claim) **followed by a frivolous appeal** leads to two 'strikes' under 28 U.S.C. § 1915(g)." Hains, 131 F.3d at 1250 (emphasis supplied). In Freeman v. Rogers, supra, Mr. Freeman's action in the United States District Court for the Eastern District of Virginia was dismissed on the grounds that his complaint failed to state a claim upon which relief can be granted. He then appealed the District Court's order which was affirmed by the Fourth Circuit because the Fourth Circuit found "no reversible error." Freeman v. Rogers, 1997 WL 414296, at *1. These circumstances result in Mr. Freeman incurring a strike because his complaint was dismissed in the District Court for failure

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[2] Freeman v. Rogers, Civ. Action No. 95-00929, E.D.Va. January 29, 1997, aff'd, 120 F.3d 261 (4th Cir. 1997)(table).

to state a claim. However, Mr. Freeman's unsuccessful appeal does not result in another strike because, unlike the *in forma pauperis* prisoner litigant in Hains, Mr. Freeman did not take an appeal that was found to be frivolous.[3]

Adepegba provides even less support for the defendants' position. The Fifth Circuit held in Adepegba that appellate affirmance, without more, of a district court's judgment dismissing an *informa pauperis* prisoner's complaint on a § 1915(g) ground, even a dismissal on the ground of "frivolousness," results in but one strike. With respect to a prior disposition on appeal affirming a district court's § 1915(g) dismissal on the ground of frivolousness, the Fifth Circuit explained,

> [W]e only addressed the merits below, not the merits of the appeal. Such a disposition merely states that the district court did not err in determining that the underlying action was frivolous. Therefore we find that the district court's [§ 1915(g) dismissal] counts, **but our affirmance, standing alone, does not.**

Adepegba, 103 F.3d at 387 (emphasis supplied). [4] In view of the fact that the Fourth Circuit merely affirmed the Eastern District's § 1915(g) dismissal of Mr. Freeman's action, its disposition does not count as a strike. And, since Mr. Freeman has only two strikes, he is not precluded from proceeding *in forma pauperis* in this case.

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[3] It should be obvious that not every unsuccessful appeal of a District Court's judgment dismissing a complaint because it fails to state a claim upon which relief can be granted is frivolous.

[4] The defendants' statement in their motion that"[c]ourts have held that an affirmance on appeal of a dismissal or a dismissal on appeal counts as a separate strike for purposes of the three strikes provision" is not correct. This and other "misstatements" in the defendants' motion are troubling. The court expects better of any attorney and particularly of one employed by the United States Department of Justice.

III

For the foregoing reasons, it is this 14th day of December, 1998, hereby

ORDERED that the defendants' motion for reconsideration of the Court's Order of December 4, 1997, granting the plaintiff's application to proceed *in forma pauperis* [# 33] is DENIED.

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HENRY H. KENNEDY, Jr.
United States District Judge

DATE:_____

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